

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**



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74-1008

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**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

BLH, INCORPORATED,

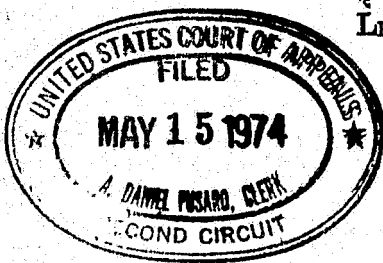
*Plaintiff-Appellee,*

—against—

HODGE & HAMMOND, INC.,

*Defendant-Appellant.*

**REPLY BRIEF FOR DEFENDANT-APPELLANT**



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BLH, INCORPORATED,

*Plaintiff-Appellee,*

—against—

HODGE & HAMMOND, INC.,

*Defendant-Appellant.*

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## REPLY BRIEF FOR DEFENDANT-APPELLANT

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### Introductory Statement

The appellant submits this Reply Brief in order to call the Court's attention to certain inaccurate and misleading statements, relating to the record, contained in the Appellee's Brief. It is the Appellant's position that those issues of fact which exist in the record will not disappear by an inaccurate summary of that record.

## POINT ONE

**The record contains genuine and substantial denials of the allegations made in the complaint which do not disappear by inaccurate or misleading argument.**

The Appellee's Brief contains several references to the affidavit of Lewis Hammond, Jr. On page 6 of the Appellee's Brief, paragraph 3, it is stated:

"The answering affidavit of Lewis Hammond, Jr. . . . relates wholly and solely to the sale of the 10,000 pound plant (large plant)"

Again on page 9, 2nd paragraph that brief states:

"Moreover, the statements in the Hammond affidavit refer only to the large plant, not to the small plant for whose purchase price summary judgment was granted."

The record, however, contains the affidavit of Lewis Hammond, Jr. (65a-67a).

Paragraph one of that affidavit contains the following:

"1. That I am the president of the defendant, Hodge & Hammond, Inc. and have personal knowledge of the transactions relating to the sale of *two asphalt plants* to Lizza Industries, Inc. and Mid-Hampton Asphalt Corporation, the subject of this litigation." (emphasis supplied)

Paragraph 7 of the affidavit also refers to plants in the plural sense:

"Whatever our relationship may be in the sale of machinery that we stock and inventory, the rela-

tionship between Baldwin-Lima-Hamilton Corporation and Hodge & Hammond for the purpose of the sale of asphalt *plants* was strictly one of manufacturer and salesman." (emphasis supplied)

On page 5 of the Appellee's Brief it is stated that the purchase orders were placed by the defendant, Hodge & Hammond. However, the purchase order, S5551, reproduced at page 76a of the Appellant's Brief contains the following wording:

"CONFIRMATION OF RAY LYNN CONVERSATION TO ED PARKHILL"

Both Ray Lynn and Ed Parkhill were employed by the plaintiff, BLH!

Appellee relies upon an alleged failure of Appellant to reply to the Rule 9g statement filed by Appellant (Appellee's Brief page 4). However, that statement does *not* allege (68a):

1. That the Distributor's Agreement applied to the transactions which are the subject of this action.
2. Delivery of the equipment; or
3. Acceptance of the equipment.

Although it is stated that appellant failed to controvert that statement the appellant *did* submit a separate, short, and concise statement of the material facts as to which genuine issues existed (Rule 9 (g)). That statement is reproduced in the Appellant's Brief at page 71a and is entitled "Reply Affidavit of Leland Stuart Beck."

The issues set forth are:

- "2. The defendant specifically and expressly denies that the relationship between the parties with re-

spect to those sales was governed by the exhibit attached to the plaintiff's papers."

"3. The defendant specifically claims that the sale of these plants was made to Lizza Industries, Inc. and Midhampton Asphalt, Inc. by the plaintiff with the defendant acting solely as a commission sales agent."

"4. The defendant specifically alleges and claims that the plants as delivered failed to comply with the terms and conditions of the purchase order."

Appellee denies the existence of any issue of fact relating to delivery or acceptance of the merchandise (brief, page 9).

The complaint in this action alleges delivery of the plant to the defendant, Hodge & Hammond, and acceptance of the plant by Hodge & Hammond (paragraph 7, 6a). The Appellee's Brief concedes that the plant was not delivered to defendant but to Lizza Industries, Inc. (page 9). Nowhere is there any proof of acceptance.

The defendant's answer squarely puts in issue the relationship of the parties and the identity of the purchaser of the subject asphalt plants (8a, paragraph 2). Rather than "bare, legal conclusions," the affidavit of Lewis Hammond, Jr., an actual participant, and therefore a competent witness, (Rule 56 (e) FRCP) sets forth facts to substantiate appellant's position (65a-66a).

"4. Mr. Lynn attended every sales meeting which I had with the customer. Mr. Lynn actually negotiated the sale and explained the equipment to the customer. At times when Mr. Lynn's expertise was insufficient to handle the subject, he called the factory from the sales meeting and received answers which he communicated to the customer."



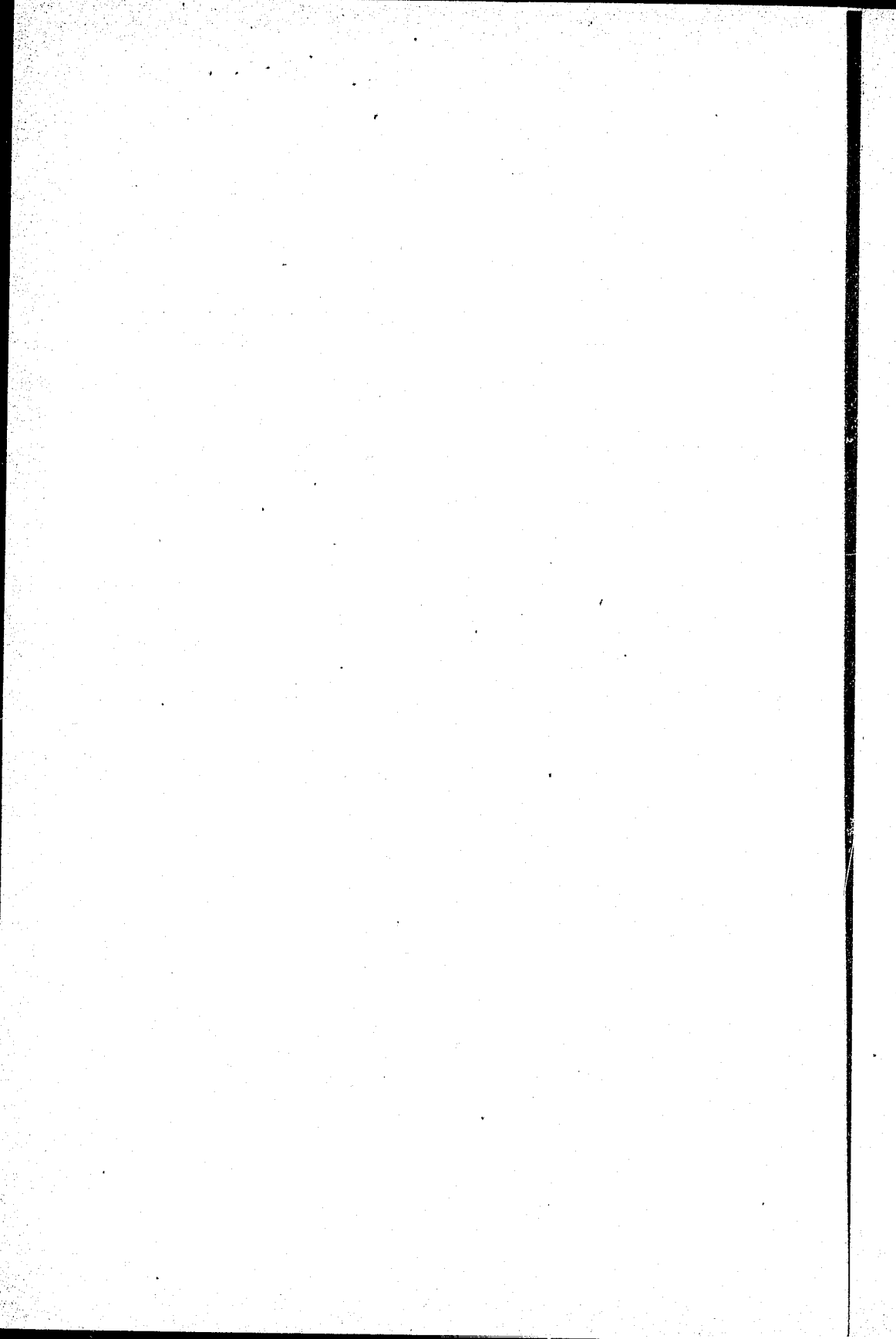
"5. The original quotation which was mailed to the customer was drawn by the factory personnel of Baldwin-Lima-Hamilton and communicated to us through Ray Lynn."

## CONCLUSION

Clearly the appellant has raised and substantiated genuine, material issues of fact, and justice requires that it be permitted to present evidence of its position at a plenary trial.

Respectfully submitted,

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Services of three (3) copies of

the within brief is

hereby admitted this 15<sup>th</sup> day,

of May, 1974

Seward + Kissel by A. Bloon

Attorney for BLH